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No. 87-1253

IN THE

Supreme Court of the United States

October Term, 1987

DAVID CANSLER,
Petitioner,

vs.

GROVE MANUFACTURING COMPANY,
Respondent,

and

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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I.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Sixth Circuit properly determine the District Court erred in denying respondent's motions for a directed verdict and for j.n.o.v. on the basis of petitioner's complete failure to prove the alleged crane defects were the proximate cause of petitioner's personal injuries?

II.

STATEMENT OF CORPORATE AFFILIATION

Grove Manufacturing Company is a division of Kidde, Inc., a privately held corporation owned by Hanson Industries, a corporation.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Grove Manufacturing Company ("Grove"), respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, published at 826 F.2d 1507 (6th Cir. 1987).

STATEMENT OF THE CASE

The petition arises from the Sixth Circuit's reversal of the District Court's denial of respondent Grove's motions for a directed verdict and for judgment notwithstanding the verdict in a products liability action governed by Tennessee substantive law and tried to a plaintiff's verdict by a jury. The Sixth Circuit reversed the District Court's judgment based on said jury verdict and remanded the case to the District Court for entry of judgment in favor of respondent Grove.

The operative facts giving rise to plaintiff's claim for personal injuries are set forth in the United States Magistrate's memorandum opinion denying respondent Grove's post-trial motion for j.n.o.v., and read as follows:

> This diversity action resulted from an injury plaintiff, David Cansler, received on June 7, 1983, when he suffered an on-the-job injury in Sullivan County, Tennessee. His employer, Greeneville Erection and Excavating Company, had a contract to sandblast a steel structure and was using a 1979 Grove TMS 300LP 35-ton hydraulic truck crane in doing the work. Just before the plaintiff was hurt, he was about six feet from the truck crane and standing under a 32 foot swingaway boom extension which he was helping rig. The boom extension is made so that it can be stowed alongside the boom and then swung 180 degrees and locked in place for use. One might think of the process of erecting the swingaway boom extension as involving the same principle as unfolding a pocket knife which is lying on its side.

> The swingaway boom extension is held in the stowed position by two front support bracket pins or "stowage pins" and a rear latch. When the swingaway boom extension is erected, two other pins are used to attach the boom nose and the swingaway boom extension. After the stowage pins are removed and the rear latch is released, swingaway boom extension is moved 180 degrees to its extended or "rigged" position.
>
> In this case, the swingaway boom extension was not erected properly. Some unknown person removed the stowage pins and released the rear latch before the two pins at the boom nose were installed. This resulted in the swingaway boom extension being unfastened by any pins, and it fell on the plaintiff when it either vibrated loose or the crane operator moved the boom during the process of trying to erect the swingaway boom extension. Its approximate 2,000 pound weight fractured plaintiff's mid-dorsal spine and rendered him a paraplegic.

See Appendix to Petition for Writ at A12, A13.

The procedural course of petitioner's claim is succinctly stated by the Sixth Circuit at pp. A4-A6 to the appendix to petition for writ, and reads as follows:

> Cansler commenced this action against Grove in the United States District Court for the Eastern District of Tennessee on May 24, 1985 seeking recovery under several different products liability theories. On December 10, 1985, Cansler and Grove stipulated to the dismissal of all his claims with prejudice except for his products liability claim anchored in strict liability as embodied in Restatement (Second) of Torts §402A. The parties

thereafter consented to trial by jury before a United States Magistrate, and the trial commenced on February 26, 1986.

At trial, Cansler attempted to demonstrate that the crane was defective or unreasonably dangerous because the warnings concerning the dangers of erecting the boom extension were inadequate to apprise both himself and the crane operator of the nature and extent of the danger involved in erecting the boom extension, and because Grove failed to install safety devices which would have prevented the accident. Cansler testified that he had never read the crane operator's handbook and that it was never made available to him by Greeneville. He did not testify, however, that the "caution" stickers affixed to the crane at each pin location were not clearly visible to him. Furthermore, he testified during his deposition that he was aware, as a matter of common knowledge, that if all pins were removed leaving the extension unsecured, it would fall. He further testified that he did not need to be warned of the danger of the extension falling because he was familiar with the crane and the danger involved in its preparation and operation.

Dr. Leighton Sissom (Sissom), Cansler's expert engineering witness, testified that if all instructions had been followed and all warnings been heeded, the accident would not have occurred. There was no evidence to the contrary. Sissom also testified that there were several "safety devices" available at the time the crane was manufactured which could have prevented the accident. These devices included a mirror situated so the crane operator could view the front support bracket and attach pins from his

position in the cab of the crane, flashing lights or "buzzers" in the cab to warn the crane operator that the pins were not in place, and an "electronic interlock system" which would have prevented the crane from being moved if the pins were not in place. Sissom stated, however, that the best method of preventing accidents such as the one which had occurred in the case at bar was for the crane operator to conduct a visual inspection of the pins before moving the crane or its boom. The crane operator's handbook directs the crane operator to follow this course of conduct.

Grove moved for a directed verdict at the close of Cansler's case-in-chief and again at the close of all the evidence. Both motions were denied. The jury returned a verdict in favor of Cansler and awarded him $1,000,000 plus his stipulated medical expenses, for a total award of $1,065,879.14. Thereafter, Grove moved for judgment notwithstanding the verdict, for a new trial, and for remittitur of the jury's damage award, all of which motions were denied by the magistrate. Grove then commenced this timely appeal arguing principally that the district court erred in denying its motions for a directed verdict and for j.n.o.v.

REASONS FOR DENYING THE WRIT

I. The Decision of the Sixth Circuit Does Not Conflict With Either Decisions of Other Federal Courts of Appeals or of the Supreme Court of Tennessee.

This case presented the Sixth Circuit with but yet another chance to apply the longstanding standard of review for an appellate court's review of a trial court's consideration of motions for directed verdict and for j.n.o.v. The very case cited by petitioner as creating a purported conflict in authorities is the same case cited and relied upon by the Sixth Circuit in setting forth this standard and formulating its analysis thereunder.[1]

> On a motion for judgment n.o.v. as on a motion for a directed verdict, the District Court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. The determination is one of law to be made in the first instance by the District Court. The standard for measuring the legal sufficiency of the evidence is the same both on a motion for a directed verdict and on a motion for judgment n.o.v. Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal. *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975)

See Appendix to Petition for Writ at p. A6.

Contrary to petitioner's argument, the foregoing standard expressly recognizes that both the trial judge and the court of appeals have an independent duty to reconsider the legal sufficiency of the evidence on every

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1. "The Court in *O'Neill v. Kildejian*, 511 F.2d 511, 513 (6th Cir. 1975) has summarized Tennessee standards in regard to directed verdicts as follows: . . ." *See* Petition at p. 7.

material point when faced with a motion for directed verdict or j.n.o.v. It is only when there is legally sufficient evidence to raise a material issue of fact that the petitioner's Seventh Amendment right to trial by jury comes into play. And in the case *sub judice*, the Sixth Circuit expressly found as a matter of law that there was insufficient evidence on proximate causation between the alleged crane defects and petitioner's injuries to allow this case to go to a jury.

Initially, this case simply involves the Sixth Circuit's application of the foregoing legal standard of review to the particular facts of this case. Nothing will be gained in terms of future guidance to other federal appellate courts by this Honorable Supreme Court's review of this case. To the contrary, further review by this Court will only result in yet another review of the same facts which have been specifically considered by the Sixth Circuit on original hearing and on petition for rehearing.

The Sixth Circuit expressly stated in its opinion that said Court carefully considered the evidence of record and found "that reasonable minds could not have concluded that the alleged unreasonably dangerous or defective conditions of the Grove crane were the proximate cause of Cansler's injuries". *See* Petition for Writ at pp. A8, A9. Proximate causation between an alleged defective or unreasonably dangerous product due to inadequate design, i.e. lack of safety devices, and/or inadequate warnings and the plaintiff's injuries, must be proven under Tennessee products liability law. *See Ricker v. Zinser Textilmaschinen, Gmbh.*, 506 F. Supp. 3 5 (E.D. Tenn. 1978, *affirm'd* 633 F.2d 218); *Wyatt v. Winnebago, Indus.*, 566 S.W.2d 276, 280 (Tenn. App. 1977). In the case *sub judice*, plaintiff simply failed to

introduce legally sufficient evidence that the alleged defects in the Grove crane proximately caused his injuries.

Petitioner argues the Sixth Circuit somehow overlooked or disregarded the testimony of his engineering expert Professor Leighton Sissom that the subject crane "was devoid of a number of possible safety devices that could have prevented this from happening." *See* Petition for Writ at p. 8. Respondent Grove quoted this very testimony from plaintiff's expert to the Sixth Circuit in its brief on appeal.[2] This same expert testimony appears in the very opinion of the Sixth Circuit. *See* Petition for Writ at p. A5. And, this same testimony was again specifically brought to the Sixth Circuit's attention in petitioner's petition for rehearing. Therefore, this evidence was obviously considered and found legally insufficient by said court of appeals.

The legal insufficiency of Expert Sissom's testimony is borne out by several cases applying Tennessee products liability law, which were cited to the Sixth Circuit in Grove's ~~brief~~ on appeal. In *Orfield v. International Harvester Co.*, 535 F.2d 959, 960 (6th Cir. 1976) the plaintiff's expert testified the product at issue was defective or unreasonably dangerous due to a design defect, i.e. failure to have a safety device, which safety device "*would have completely prevented plaintiff's injury.*" (emphasis ours). In *Jackson v. Tenn. Val. Authority*, 413 F. Supp. 1050 (M.D. Tenn. 1976, *affirm'd* 595 F.2d 1120) the court found no causation between

2. "Concerning the causation issue, the only testimony given by Professor Sissom which even attempts to address causation was his opinion that the Grove crane "was devoid of a number of possible safety devices that *could have* prevented this from happening" Leighton Sissom at TR Vol. I 183 (*See* Grove's Brief on Appeal at p. 23).

alleged violations of Tennessee statutes requiring screens over skylights and plaintiff's falling injuries where plaintiff *failed to show that placement of screens over or under skylights would have succeeded in preventing his fall* (emphasis ours). And finally, in *Ellis v. H.S. Finke, Inc.*, 278 F.2d 54 (6th Cir. 1960) a directed verdict for the defendant manufacturer was upheld on appeal because "the evidence does not disclose any causal connection between the falling of the platform and the failure to install the new safety device". 278 F.2d at 55, 56. From the foregoing it readily appears why Expert Sissom's "could have" testimony was found by the Sixth Circuit to constitute legally insufficient evidence on proximate causation to allow this case to go to the jury. That evidence would only have permitted the jury to "speculate" on whether or not plaintiff's accident would have indeed been prevented by the presence of these additional safety devices. And, a jury cannot render its verdict on the basis of speculation, surmise, or conjecture. *See Gold v. Nat'l Sav. Bank of City of Albany*, 641 F.2d 430, 435 (6th Cir. 1981) *cert. denied* 102 S. Ct. 116.

In addition to inadequate design, petitioner's remaining strict liability theory of recovery against respondent Grove was based on alleged inadequate warnings. Again, petitioner takes issue with the following language from the Sixth Circuit's opinion:[3]

> Sissom, Cansler's expert engineering witness, testified that had Grove's instructions been followed and warnings been heeded, the boom extension

3. "This quote clearly shows Dr. Sissom did not state that had the instructions been followed the accident would have been prevented, but rather that the instructions themselves were inadequate." *See* Petition for Writ at pp. 9, 10.

> could not have fallen and Cansler would not, therefore, have suffered an injury. (Court's Opinion, p. 8) *See* Petition for Writ at p. A9.

Interestingly enough, the trial judge, Magistrate Robert P. Murrian, made the exact name evidentiary observation in his memorandum opinion denying Grove's post-trial motions.[4] In fact, every single trial witness, both lay and expert, who testified on the liability issue stated this accident would never had occurred if the instructions and warnings given by Grove for the subject crane had been followed by petitioner and his co-workers.

Furthermore, concerning the lack of proximate causation between alleged inadequate warnings and instructions to the petitioner himself and his injuries, the petitioner admitted he was aware of the danger at issue and did not need to be warned.

> Q. Just because you had worked around this crane for two or three months, or a little over a month up there at Holston Defense, you know from working around it, and just plain common sense, that if that jib is, if all the pins are taken out of it and it's sitting up there on side of that crane, that it's going to fall off?
>
> A. It might fall, yes, sir.
>
> Q. So you really didn't need anybody to warn you of that, did you?
>
> A. No. I guess not.

(Davis Cansler at TR Vol. I 147, 148).

4. "Dr. Leighton E. Sissom, the plaintiff's engineering expert witness, testified on cross-examination that he had 'no problem' with the instructions that were given and that if they had been followed, the accident would not have occurred. There was no evidence to the contrary." *See* Petition for Writ at p. A17.

Finally, petitioner, in part, based his liability theories on the supposition that somehow this accident might have been prevented through a change in the conduct of the crane operator himself. However, petitioner failed to call the crane operator as a witness to testify as to how any additional warnings, instructions and/or safety devices would have altered his conduct and prevented this accident. Such failure again amounted to a lack of material evidence on proximate causation. Therefore, under Tennessee law, respondent submits the action taken by the Sixth Circuit in this cause was entirely proper.

II. The Sixth Circuit Has Not So Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

By its very nature, this alleged ground for review implies, and so states, that the Sixth Circuit has stepped far outside the proper realm of its judicial review in deciding this case. Petitioner cites this ground and makes a conclusory statement without any supporting facts or authority. As stated earlier, a close review of the Sixth Circuit's opinion discloses said court made a very careful review of the evidence of record in this cause applying the long established review standard for motion j.n.o.v. and directed verdict. Petitioner simply disagrees with the Sixth Circuit's conclusion concerning the legal insufficiency of his proximate cause evidence. Such a disagreement over the legal significance of the facts of this case should not call for the exercise of this Court's power of supervision.

CONCLUSION

There is no conflict between the Sixth Circuit's decision in this case and other appellate decisions, either federal or state. This Court's power of supervision should not be exercised to review the Sixth Circuit's application of longstanding Tennessee and federal review standards for motions for directed verdict and for j.n.o.v. Accordingly, there is no basis for granting Cansler's petition.

Respectfully submitted,

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